

Steagald v. United States

Oral Argument - January 14, 1981

Warren E. Burger

We'll hear arguments next in Steagald v. the United States.

Mr. Young, I think you may proceed when you are ready.

John Richard Young

Mr. Chief Justice and may it please the Court:

My name is Richard Young, I'm from Atlanta, Georgia, and I've been appointed by this Court to represent the Petitioner in this case.

On January the 18th, 1978, under the direction of the Federal Drug Enforcement Administration, approximately 12 police officers armed with a variety of shotguns, side arms and automatic weapons, spread-eagled the Petitioner against his automobile in full view of a public road and in front of his home.

They detained him there, and then proceeded to conduct a room to room search of his house.

Warren E. Burger

Would it make any difference if there had been only two officers?

John Richard Young

Your Honor, we... when we're looking at the degree of the intrusion, that is... that's the point I'm trying to make.

I think it's important, when we're talking about the privacy of the American citizen, and evaluating the extent of a search, to recognize that this was an extraordinary invasion of his privacy.

Harry A. Blackmun

It was his house, is that fixed in the record?

John Richard Young

Your Honor, I refer to it as his house rather than calling it the premises in which he had a reasonable expectation of privacy.

The standing issue I will address; however, we believe that the record supports the finding, if the government is entitled to raise that issue at this late date, that indeed he did have a reasonable expectation of privacy in the home.

I refer to it as his home for shorthand.

The government took these actions without a search warrant--

Potter Stewart

It is the entry into the home that presents the issue in this case?

John Richard Young

--Yes.

Potter Stewart

Not what happened outside the house.

John Richard Young

No sir, I'm just giving the factual background which includes that.

Potter Stewart

Right.

John Richard Young

There was no search warrant and there were no exigent circumstances excusing the absence of the search warrant.

Inside the house, the police found 45 pounds of cocaine, which Petitioner moved to suppress on the grounds that the warrantless search violated his Fourth Amendment right to privacy.

William J. Brennan, Jr.

How did they connect him with the 45 pounds of cocaine?

The prosecution was what, for possession, or--

John Richard Young

Possession and for conspiracy.

William J. Brennan, Jr.

--of that cocaine?

John Richard Young

Of that cocaine.

William J. Brennan, Jr.

Well, how did they tie him to it?

John Richard Young

They did it, basically, Mr. Justice Brennan, with a series of pre-search contacts which the Petitioner had with the import company which had imported the brass lamps from Colombia in which the cocaine was secreted.

That issue is really not before the Court, but the sufficiency of the evidence--

William J. Brennan, Jr.

I was curious, since the government's position apparently is that he had no privacy in this home, whatever, and therefore no standing.

John Richard Young

--Yes sir, that's their position now; it wasn't their position--

William J. Brennan, Jr.

How did the government tie him then to the stuff they found in the house?

John Richard Young

--They did it with circumstantial evidence, Your Honor, by... and it would take quite some time to elicit all the facts, but he--

William J. Brennan, Jr.

Well, don't bother.

I'll ask Mr. Frey.

John Richard Young

--All right, sir.

Thank you.

The motion was denied on the basis that the agents who conducted this search had an arrest warrant for an individual by the name of Ricky Lyons, who they had reason to believe was located in Petitioner's home.

This ruling was made on the basis of the Fifth Circuit case of *The United States v. Cravero*, which it held that an arrest warrant, even without exigent circumstances was a specific exception to the Fourth Amendment search warrant requirement, if the officers had a reasonable belief that the subject of the warrant could be found inside the premises.

I want to call the Court's attention to two other specific facts before I move directly to the issue.

The phone call which was made by a Drug Enforcement Administration agent, which assembled these 12 officers, was made at approximately 1 or 2 o'clock on the afternoon of January the 18th, prior to the 5 o'clock search.

The phone call was made from the United States District Courthouse in Atlanta, Georgia, where there were three full time magistrates on duty.

The agent testified at the suppression hearing that there was no, that there was nothing that prevented him from obtaining a search warrant.

Secondly, when this platoon of agents arrived at this house... there were two houses situated more or less next door... both houses were approached, only one house was ultimately searched... when asked why they went down to the second house, the agent at the suppression hearing stated,

"The purpose of going to the A-frame. "

--that's what the other house was referred to in the record...

"was the same as going to the house at the top of the hill. "

"We didn't know which house the individuals might have been at. "

Warren E. Burger

Now, at that time, what was... who was the object of their interest in their pursuit?

John Richard Young

Allegedly... well, no one was the object of their pursuit.

Allegedly, Ricky Lyons was the object of their interest, although, as I will explain, we believe there is substantial doubt on the record that in fact they were going there after Ricky Lyons, or if there were going after--

William H. Rehnquist

They did have an arrest warrant?

John Richard Young

--Yes sir.

Well they didn't have it, but under federal law, it's not necessary that they have it.

There was one existing, but they didn't have it in their possession.

William H. Rehnquist

Well, one was outstanding then?

John Richard Young

Yes sir, there did exist an arrest warrant for Ricky Lyons.

It had been issued in July of 1977, as a consequence of a July '77 indictment which alleged acts that had occurred in 1973.

It was a marijuana case.

William H. Rehnquist

And it's your position that in addition to this arrest warrant for Ricky Lyons, and a reasonable belief that Ricky Lyons was on the premises, they needed a search warrant?

John Richard Young

In the absence of exigent circumstances?

William H. Rehnquist

Yes.

John Richard Young

Precisely my position.

William H. Rehnquist

All right, just what would one have told one of the magistrates on duty in Atlanta, in order to obtain the search warrant for... going on the premises of your client to arrest Ricky Lyons?

John Richard Young

He would have told the magistrate, first under oath, that he had obtained information from a reliable confidential informer, upon whom he had relied successfully in the past, and that the information

was credible, and that the information consisted of this: the informant provided the DEA agent with a phone number where he... where the informant said, Ricky Lyons and his partner, Jimmy, his partner in the drug business, Jimmy, could be found within a pertinent period of time.

He told the agent that he knew that because he heard, he talked to him on the phone, he was given that phone number as to where Jimmy was, and he overheard Ricky's voice in the background.

The agents then, of course, traced the address through the phone company, and that's all the agent would have had to have told the magistrate, in order for that magistrate to make the determination that Petitioner's right of privacy would have to yield to the DEA's need to search for Ricky Lyons.

However, the magistrate never had that opportunity; the police made this judgment on their own.

William H. Rehnquist

You concede that would have been enough, had the search warrant been based on that--

John Richard Young

Had the search warrant been... well, for purposes of this appeal, it is assumed there was probable cause or at least reasonable belief to belief that Lyons was there.

William H. Rehnquist

--Well there really isn't a great deal that a law enforcement officer, who has an outstanding arrest warrant and believes that the subject of the warrant is on someone else's premises, can tell a magistrate if

he's seeking a search warrant of the premises in addition to the kind of information that you're talking about, is there?

He may not know anything about the premises at all.

John Richard Young

That's true.

However, it's our position that the issue is not so much how much he would have to tell the magistrate, but rather, the need of the magistrate to stand between him and the privacy rights of the Petitioner in the absence of exigent circumstances.

That's our position.

And we contend, as Your Honor has noted, that there must be a search warrant in this case, and we... or, in these circumstances.

And we begin with a notion that the Fourth Amendment contains two basic principles.

And one is, which apparently this case met for the purposes of this appeal, that there is probable cause to believe that the object or the person which the police are seeking is contained in the place they want to search.

William J. Brennan, Jr.

Now Mr. Young, did you say they did not in fact have the arrest warrant on them?

John Richard Young

No sir.

And in fact, nobody, none of these agents had even ever seen--

William J. Brennan, Jr.

No, but they were acting on the authority of the arrest warrant, weren't they, when they made the entry?

John Richard Young

-- They were, precisely; yes sir.

Warren E. Burger

Does it make any difference whether they had it in their pockets, or not?

John Richard Young

No sir, no.

Not under federal law.

Warren E. Burger

No sense spending time on that.

Now, you've referred to the exigent circumstances, Mr. Young.

Suppose, instead of having all these advance preparations, they had been literally pursuing Lyons, and followed him on foot and they saw him dart into this house, could they have followed him?

John Richard Young

Certainly, Your Honor.

Under *Warden v. Hayden*, that's hot pursuit and this Court permits that.

Warren E. Burger

After they got in the house, if they saw marijuana or other contraband in plain view, could they seize it?

John Richard Young

Yes sir, under Warden v. Hayden, they could.

Warren E. Burger

And it would be admissible?

John Richard Young

Yes sir.

That is an exigent circumstance--

Warren E. Burger

From his point of view, the occupant of the house, whatever his right to be there may be from his point of view, why is it different whether the police got in there by... the agents got in there in hot pursuit, or got in there in cold, deliberate steps?

John Richard Young

--From his point of view, Your Honor, it is that he has the right and the need, and this country has the right and the need, for an individual's expectation of privacy not to yield on the basis of the judgment of the police, but on the basis of the judgment of a neutral and detached magistrate.

The reason that a magistrate is interposed was most succinctly said by Mr. Justice Douglas in McDonald v. United States, when he said

"power is a heady thing, and the police acting on their own cannot be trusted. "

That is what is important, is that magistrate, in the absence of an exigent circumstance such as hot pursuit, as you indicated, must stand between the police and the citizen.

Warren E. Burger

But from his point of view, I take it, you concede that he'd be in a very different position from the hot pursuit situation, he would have no basis for having the evidence, the plain view evidence rejected?

John Richard Young

That's correct, Your Honor.

Of course, the determination of probable cause, and the need to invade the citizen's privacy, Petitioner's privacy, must be made prior to the search.

And in this case, of course, it was made only by the police.

This--

Warren E. Burger

Now by hypothesis, what do you, if I may press this one on you, what should they have done: surrounded the house, since they had adequate manpower, and sent one of the agents down to get the warrant?

John Richard Young

--No sir, when Agent Goodowens called to assemble this raiding party, he should have taken five minutes and gone next door and talked to the magistrate and gotten a search warrant.

Warren E. Burger

Well, would it have been adequate if... he, having failed to do that and arriving at the house, could they have secured the premises in the sense of surrounding it, and then got the warrant?

John Richard Young

Certainly.

Warren E. Burger

Would you say, that was the fallback position they should have carried out--

John Richard Young

Yes sir.

Warren E. Burger

--not having--

John Richard Young

That's a fallback position could have carried out.

Warren E. Burger

--Assuming, as Mr. Justice Rehnquist suggested, they had enough to present to the magistrate to persuade him to issue the warrant, the search warrant?

John Richard Young

Correct.

Warren E. Burger

The search warrant necessary to execute the arrest warrant?

John Richard Young

The search warrant necessary to give them the right to enter Petitioner's home in order to execute that arrest warrant.

Thurgood Marshall

You know, I have to raise the point that, I have been listening carefully but I have great difficulty in putting all this together until I find out on what basis you say that that's his home, emphasis his underscored.

John Richard Young

All right, sir.

Harry A. Blackmun

It really was the Gaultney's place of residence, wasn't it?

John Richard Young

No sir, it was leased by the Smiths, or by Mr. Smith, who was the individual who was arrested as he came into the house and arrived in a truck.

Harry A. Blackmun

I think we'd all feel better if you'd call it the home, rather than his, because that issue is still--

John Richard Young

All right.

Well, let me go ahead and address the standing issue at this time, and insofar as it is properly before this Court.

We believe that the standing issue is not before this Court and would urge the Court not to take the government's invitation to remand this case in order to determine if Petitioner has a standing under the more recent case of *United States v. Salvucci*.

And our reason for this is that *Rakas v. Illinois* was decided in December of 1978, which clearly delineated the notion that standing is a function of an expectation of privacy.

Briefs in the Fifth Circuit in this case, by the Appellant and the government were not filed until 1979, so not only did the government have ample opportunity to ask the Fifth Circuit to remand or to... remand for standing or to decide the Petitioner didn't have standing.

But moreover, they could have raised it, of course, at the trial level.

Salvucci raised his standing argument from the very beginning, and of course *Salvucci* eventually overruled the automatic standing requirement of *Jones*.

The government says that because we were all proceeding under *Jones*, that this Court should reevaluate the case in light of *Salvucci*, we say the government made a tactical decision.

In the Fifth Circuit, they had *Rakas* to stand on, and they could have asked that the case be remanded; they didn't.

We infer from the record that they didn't, because they knew that they had *Cravero* in their hip pocket.

William J. Brennan, Jr.

--Well, Mr. Young, I take it, whether or not the government's omission to raise this below precludes their being heard on it here, is

at least in part, isn't it, dependent upon whether or not this standing question is jurisdictional?

John Richard Young

That may well be, Your Honor.

William J. Brennan, Jr.

If it's in fact jurisdictional, and thus I expect they may raise it here and say you can't do it because you have no jurisdiction here, could that be it?

John Richard Young

That... it could be.

William J. Brennan, Jr.

Well now, what is it?

What's the distinction between prudential and jurisdictional; as I noted, Salvucci, you'll recall, refers to it as Fourth Amendment standing... I don't know what that means.

John Richard Young

Well I'm not sure I know.

I think that--

William J. Brennan, Jr.

Perhaps no one does--

John Richard Young

--I'm not... I would be speculating, I think it's very difficult to tell.

William J. Brennan, Jr.

--Do you think this is jurisdictional?

John Richard Young

Your Honor, I really haven't given that... I haven't evaluated that aspect of it.

Our position on standing is that it was simply, it was waived by the government below and it was waived on the basis of a tactical decision.

William J. Brennan, Jr.

Well, except that what I'm suggesting is, they didn't raise it and they maybe deliberately didn't raise it.

But if it is jurisdictional, doesn't that mean we can't hear them here, even though they deliberately did not raise it below?

John Richard Young

I can't answer that, Your Honor.

I can't answer that.

However, we also contend that from the record, there are... there is enough evidence to reasonably infer an expectation of privacy under Salvucci, even under the stricter standard of Salvucci, and we point to the fact that the confidential informant stated that there were four or five people staying there.

We infer that that is Gaultney and his wife, who, the record indicates, were staying in the front bedroom; Smith and his wife, who, the record doesn't indicate where they were staying, but it indicates that he had leased the place, and Steagald.

Second, Steagald was out front of the house in his shirt sleeves on a wintry January afternoon, his sweater which he knew exactly where it was, was found in the house.

Third, he had papers of his in the house, and fourth, --

William J. Brennan, Jr.

Are those the checks, or something?

John Richard Young

--Yes sir, two checks and an invoice.

William J. Brennan, Jr.

Two checks.

John Richard Young

Two checks and an invoice.

And fourth, the automobile out front, we believe, might be reasonably inferred to be his automobile inasmuch as the trial transcript--

William J. Brennan, Jr.

Was he washing it or cleaning it?

John Richard Young

--He was... there was apparently something wrong with the engine, Your Honor; they were looking at the engine.

William J. Brennan, Jr.

Oh.

John Richard Young

Inasmuch as the record indicates that Steagald had an old, beat-up Volkswagen.

Now any one of these factors taken by itself is not going to give Petitioner a reasonable expectation of privacy of his home, I don't contend that.

But these facts taken together, we believe, give rise to that inference.

John Paul Stevens

Mr. Young, on the... I don't want you to go into the facts in great detail, but you indicated before that the proof of the substantive offense itself was largely circumstantial.

Was the... Steagald's connection with the place in which a lot of these things were found, one of the circumstances on which the government relied to establish guilt?

John Richard Young

The way that they... I contended at trial that his connection with the house was too tenuous to even get to the jury, to withstand the judgment of acquittal motion.

The government argued, in response to that and to the jury, once it got to the jury, that the fact that his sweater was there, the fact that these papers were there, the fact that his car was out front, these facts that I have just elicited, to rely on alleging a reasonable expectation of privacy, the government relied upon... to place him connected to that house--

William J. Brennan, Jr.

And connected to the--

John Richard Young

--Other than that... sir?

William J. Brennan, Jr.

--And connected to the drugs?

John Richard Young

And connected to the drugs, yes sir.

William J. Brennan, Jr.

Is that the way they connected him, with evidence like that?

John Richard Young

That was part of the evidence, Your Honor.

There was a... the Court has to understand that, prior to this search, the... there was evidence which the government introduced that involved a number of contacts that Steagald had, where the import company that it was proved had moved the drugs from the airport to a warehouse, he rented the warehouse, he set up an answering service for the import company, all these type of circumstantial contacts with the merchandise in which this cocaine was concealed.

So the government relied upon that, and then the government relied upon the various evidentiary inferences to which it was entitled from those four or five facts that I have just mentioned, concerning his connection with the house in which the cocaine was ultimately found.

So we say that... that the Court should find--

William J. Brennan, Jr.

So at least to that extent, I gather here was a case or controversy between the government and him in connection with the drugs themselves, wasn't there?

John Richard Young

--Oh yes sir.

The--

William J. Brennan, Jr.

That they were his?

John Richard Young

--Whether--

William J. Brennan, Jr.

Does that bear on whether this is jurisdictional or not?

John Richard Young

--Your Honor, I simply have to apologize.

I have not given that any thought.

William J. Brennan, Jr.

Well I know, but standing in a case or controversy sense is what makes it jurisdictional, isn't it?

John Richard Young

I believe so, yes, yes sir.

Now government also--

Thurgood Marshall

Also, I understand you to say that he had privacy in one room in that house?

Isn't that what I understand you to be saying?

You said somebody was sleeping in one room--

John Richard Young

--One bedroom, yes sir.

Thurgood Marshall

--And he... or do you say he had privacy in the whole house?

John Richard Young

Well I say he had privacy in the whole house because he--

Thurgood Marshall

How?

John Richard Young

--because he was living there, Your Honor.

Thurgood Marshall

Would that go for an apartment, too?

How about a rooming house with 18 rooms?

John Richard Young

No sir, I think that would be more... the equivalent to a hotel.

Thurgood Marshall

I must have missed it.

Where was the dope found?

John Richard Young

It was found in the front... well, it was found in several places, but it was first found--

Thurgood Marshall

Well that's why they say it was his house.

John Richard Young

--in the front bedroom.

Thurgood Marshall

I thought it was all found in his room.

It was not?

John Richard Young

No sir.

Thurgood Marshall

Was any found in his room?

John Richard Young

Well again, the record doesn't clearly indicate which room was his.

Thurgood Marshall

So does that mean that all of them are his?

John Richard Young

So we don't know which--

Thurgood Marshall

Or none of them are his?

Does the failure of the record to show that all of the house was his or none of the house was his?

John Richard Young

--We say on the basis of those... those facts I mentioned earlier, that he has a reasonable expectation of privacy in the entire premises.

Thurgood Marshall

And the government says for that reason he doesn't have any?

John Richard Young

Yes sir.

Thurgood Marshall

So what do we do, toss a coin?

John Richard Young

No sir, you find that the government has waived it, at least that's what I urge the Court to do.

Now another issue that the government raises... before I get to the next issue the government has raised, let me say that our position on the arrest warrant is this; that the arrest warrant affords no protection, indeed in its issuance it doesn't even take into consideration the expectation of privacy of the third party... consequently the arrest warrant is simply not sufficient and it makes

on difference whether the search is for a person or a thing, since the intrusion is the same.

So we say that the government had to have a search warrant.

Now the government also raises, again for the first time in this Court, the argument that because Cravero... United States v. Cravero... was the law in the Fifth Circuit at the time of this search... that this Court should as I understand their argument, adopt a good faith exception to the exclusionary rule and hold that the agents in this case were acting in good faith, in reliance upon Cravero.

We say in response to that, first, there is substantial doubt from this record that the governments were in fact acting in good faith.

We believe that the government agents believed that they were going to find 1500 pounds of marijuana in this house and that was their first interest.

And we point to these facts in the record: the confidential informant had said that there had been a drug deal in Florida recently consummated by Ricky Lyons and this individual named Jimmy, that Jimmy had attempted to sell cocaine, a matter of days or a week prior to the conversation that he had in early January with the Drug Enforcement agent--

William J. Brennan, Jr.

Is Jimmy the Petitioner?

John Richard Young

--No sir, Jimmy is Ricky Lyons' partner.

William J. Brennan, Jr.

I see.

John Richard Young

All right.

When the confidential informant first told the Drug Enforcement agent about the attempt by Jimmy to sell him cocaine, the agent's first response was not to find Ricky Lyons, was not to get that information, but was to try to prevail upon the confidential informant to set up a drug deal with Jimmy and have this one go through.

Second, that same agent testified at the evidentiary hearing on the motion to suppress as to whether or not it was his impression from the confidential informant that the house where Ricky Lyons was, was a "stash house for narcotics".

He answered, I asked him that, if he knew there was going to be any dope there, he says they always had dope around.

I said do you know if there's going to be any there, he said well I don't know, but they deal in it, they might have.

And that's in Volume II of the suppression hearing at page 47.

Moreover, Agent Goodowens testified... who was one of the Drug Enforcement Administration agents... testified that the confidential informant believed that there would be drugs there, but that he didn't have it on what the agent called hard information, in other words, the government agent did not have sufficiently hard information to get a search warrant for drugs, but they believed that drugs would be there.

Finally, a Gwinnett County police officer, which is the county in Georgia where this house was located, testified that one of the Drug

Enforcement Administration agents had told him when the agent first called him to organize this raid, that he had information there might be a quantity of marijuana in this house and he testified that to the best of his recollection the agent told him 1500 pounds.

Finally, after the quick, first search of this house, when the agent came back outside to report what he had found to the other agents, he did not say, as they were looking for this armed and dangerous Ricky Lyons, no luck, Ricky Lyons isn't here.

He said, I think I found some cocaine.

We believe Your Honors, that there is substantial doubt in the record that they were acting in good faith; indeed, we believe there is a great likelihood that the agents in this case did exactly what Cravero gives them an incentive to do, and that is, they used an arrest warrant to circumvent the search warrant requirements of the Fourth Amendment.

William H. Rehnquist

Mr. Young, ordinarily this Court does not canvass volumes of records to determine motivation where two courts have found something sufficient.

You are not challenging the sufficiency of the evidence, are you?

John Richard Young

No, Your Honor.

No sir.

Secondly, on the good faith argument, in order to apply a good faith exception here in this case the Court would have to avoid reaching

the actual issue it has taken certiorari on.

Article III, of course, would prevent this Court from finding that a search warrant is necessary in these circumstances, but it's not... and will be necessary from now on, but it's not necessary to apply the exclusionary rule in this case because the government was acting in good faith.

That would stand as mere dictum.

Therefore, an order to avoid applying the exclusionary rule to Petitioner's case by adopting some sort of a good faith exception to the exclusionary rule, the Court would have to avoid the central issue in this case.

We urge the Court not to do that, the question has evaded review for quite some time; it was characterized as a grave constitutional issue as long ago as 1958 in *Jones v. United States*, and the *Cravero* rule or its equivalent, is used by a number of the Circuits... it is not used by others, the states are split on the use of it, as are the commentators.

But we believe the Court should address that issue.

Potter Stewart

Mr. Young, I notice in your brief... actually... that there's only one question for review?

John Richard Young

There's only one issue before this Court that was taken on certiorari, yes sir.

Potter Stewart

Did we give a limited grant of certiorari?

Or was that the only question you were--

John Richard Young

No, two questions were presented.

The second question was whether or not there was probable cause to believe Ricky Lyons could be found in this house--

Potter Stewart

--On that we did not grant certiorari?

John Richard Young

--No sir.

Cert was denied on that and granted on this question.

Potter Stewart

On this single question?

John Richard Young

On that single issue, yes.

Potter Stewart

Thank you.

John Paul Stevens

Mr. Young, may I ask you two questions?

First, is it correct that the reasonable belief standard of the Fifth Circuit is the same as the probable cause standard?

John Richard Young

No, Your Honor.

It is not.

The Cravero says that reasonable belief embodies the same standard of reasonableness as probable cause, but simply gives the police... or permits the police to avoid a second trip to the magistrate, in other words, having been there once to get the arrest warrant.

John Paul Stevens

Right, I read that.

That to me, implies that they had to have what would have been necessary to convince the magistrate.

Yes.

Which would have been probable cause; it wouldn't do any good to go to the magistrate with something less than probable cause, because you wouldn't get the search warrant.

John Richard Young

Well, but Your Honor, we say that probable cause is... goes hand in hand with one of two things: a magistrate, or exigent circumstances.

And in this case, or in Cravero, since the Court permits a finding of probable cause without exigent circumstances and without a magistrate, that is why they have called it something of a lesser standard, namely reasonable belief.

It is also the authority upon which Cravero relies, is really a strain of authority from the previously discredited Rabinowitz decision that also dealt in terms of a reasonable belief standard.

And we believe that reasonable belief is something less than probable cause.

John Paul Stevens

Well you'd make the same basic argument even if it were the same, though, I take it, that there's still a warrant required?

John Richard Young

Yes sir.

I would.

John Paul Stevens

On the basic argument, the government says that the common law is against you, and I don't think you respond to that; do you concede they correctly interpret the common law?

John Richard Young

No, Your Honor.

In fact, having read several of the cases upon which the government relies, we say that there are two significant errors in the government's analysis of those cases.

And the first is, that for example in... I think it's Semayne's Case, Lord Coke is addressing a situation where the house which is entered is the defendant's house himself, not a third party's house.

Moreover, in the Semayne's Case, Lord Coke is somewhat elaborating upon the rationale for his decision in that case, which was a civil case incidentally.

And he gives an example in which the type of arrest that occurred in this case would be permitted, and it was a hot pursuit example.

It's a straight *Warden v. Hayden*, decided in 1967.

Finally of course, because of the reverence of common law for the sanctity of the privacy of an individual's home as opposed to the right of privacy in other situations, we believe that the common law did not permit this type of search and if... but in any event, or at the very least, it is unclear whether the common law did or not.

Additionally, the arrest rules of common law arose in the context of usually civil damage suits or either false arrest or trespassing.

And consequently, they are not... even if they are as the government says they are... they are not directly applicable to the situation we are dealing with.

And the officer's authority to enter was generally established in cases where he was being sued and that was his defense, that he had the authority to enter.

And finally, of course, as this Court noted just last term, in *Payton v. New York*, this Court does not simply freeze into constitutional law, law enforcement practices that existed at the time the Fourth Amendment was enacted.

I'll reserve the remainder of my time for rebuttal, thank you.

Warren E. Burger

I think you've used all of your time, Mr. Young.

John Richard Young

Oh, I have?

Warren E. Burger

Mr. Frey.

Mr. Andrew L. Frey

Mr. Chief Justice and may it please the Court:

This case presents three distinct issues to the Court: the first is whether Petitioner's legitimate expectations of privacy were implicated by the entry into the cabin so that he is entitled to raise the substantive Fourth Amendment issue.

The second is whether the Court should decline to consider the substantive Fourth Amendment issue in this case as a matter of exclusionary rule, and retroactivity policy.

And the third, if the Court reaches the issue, is whether an arrest warrant plus reason to believe or probable cause to believe the subject of the warrant is on the premises suffices to justify an entry into third party premises to execute the arrest warrant.

With the Court's permission, I will treat these issues in the order I have listed them.

First, with respect to what I hope Justice Rehnquist will give me the liberty of calling the standing issue, this is essentially offered to this Court as an alternative ground for affirmance.

We do not in fact suggest affirmance on this ground, although we think the record would permit it, but, in light of what the Court did in Combs and what the Court did last term in Salvucci, and the fact that there was no focus on the issue of Petitioner's expectation of privacy

in the cabin, we think fairness would justify giving him an opportunity to demonstrate that on a remand.

However--

William J. Brennan, Jr.

Well why do you think we have to hear you?

Mr. Andrew L. Frey

--Excuse me?

William J. Brennan, Jr.

Why do you think we have to hear you on the issue, since you never raised it before?

Mr. Andrew L. Frey

Well, let me say first of all that we do not contend that the issue is jurisdictional.

This is not standing in the constitutional case or controversy sense, so we do not say that the Court is required to consider the issue on that--

William J. Brennan, Jr.

Well why should we, when you didn't raise it below?

Mr. Andrew L. Frey

--Now, there are two separate questions: one is, are we entitled to raise it in this Court; and the second question is, if we are entitled to raise it, must the Court consider it?

Now, I'm not sure that the Court must consider it, but I--

Byron R. White

Well, you know we're not required to consider it under our cases, don't you?

Mr. Andrew L. Frey

--Well, I am not... I have found the cases somewhat confusing, but I will--

Byron R. White

Well, we've considered some, but we've never, nobody's ever suggested we had to.

Mr. Andrew L. Frey

--Well,--

William H. Rehnquist

We never admit we do--

Mr. Andrew L. Frey

--Let me just cite the Court three cases in which points which are pertinent to this are made, quite briefly.

In the New York Telephone Company case, 434 U.S. at 166, Note A, the Court said the prevailing party may defend the judgment on any ground which the law and the record permit, that would not expand the relief that has been granted.

William J. Brennan, Jr.

--But don't ordinarily, we qualify that, provided he's raised it below?

Mr. Andrew L. Frey

I was interested to find, in looking at it, that it is not ordinarily so qualified.

Byron R. White

But that falls considerably short of saying that the Court has to consider--

Mr. Andrew L. Frey

Well, I'm now answering Justice Brennan's question--

Byron R. White

--As to whether you're entitled to raise it?

Mr. Andrew L. Frey

--Whether we're entitled to raise it.

In Dandridge against Williams, the Court said the prevailing party may of course assert in a reviewing court, any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.

John Paul Stevens

But Mr. Frey, you'd really get a different judgment, wouldn't you, if you sent it back for further hearing in the trial court; the Court of Appeals affirmed?

Mr. Andrew L. Frey

Well that's all... this would be a ground for affirming the conviction and a denial of the suppression motion.

John Paul Stevens

I thought you said earlier that you thought the proper disposition would be to send it back for another hearing to give them an opportunity to establish--

Mr. Andrew L. Frey

Well let me get to that in a second.

If I can just mention the third case, which is Bondholders Committee against Commissioner, 315 U.S., and this is at 192, the Court said that though Respondent apparently did not urge this point before the Board or the Court below, it may of course support the judgment here by any matter appearing in the record.

Now, our position, Mr. Justice Stevens, is that this record contains no evidence sufficient to support... for the Petitioner to carry his burden of demonstrating that he had a legitimate expectation of privacy in the cabin.

We're of course not saying that he was a trespasser on the premises; what we are saying is that he was outside at the time the entry was made, there is no indication other than counsel's surmise, nothing in the record that he lived in the cabin, he was not the lessee--

William J. Brennan, Jr.

--Well what about the checks and the sweater and those other things?

Mr. Andrew L. Frey

--Yes, there are indications, including the cocaine, that he was present--

William J. Brennan, Jr.

Is he right, that you used, or that the government used those at the trial to connect him with the cocaine?

Mr. Andrew L. Frey

--Yes, that evidence.

But--

William J. Brennan, Jr.

Well why isn't it... if it's available to the government to connect him with the cocaine in the cabin, why isn't it also available to establish that he had a privacy at this cabin?

Mr. Andrew L. Frey

--This is an issue that has been raised, we filed a petition last year in a case called Conway, which was sent back after Rawlings and Salvucci were decided.

An individual may have possession of items that are found in a premises or in a suitcase or in a place sufficient that he can be criminally responsible if the item is contraband, without having an expectation of privacy in the place where they are located.

If you go into a public restaurant... obviously--

William J. Brennan, Jr.

Well I know but the sweater and the checks and those things, they weren't contraband.

Mr. Andrew L. Frey

--Well I would say that on this--

William J. Brennan, Jr.

As I understand it, the government used them at trial to establish that the cocaine was his?

Mr. Andrew L. Frey

--As part of the evidence, there was--

William J. Brennan, Jr.

I know, as part of it, but that was the evidence you relied on?

Mr. Andrew L. Frey

--Yes, but we don't deny that Mr. Steagald was ever in the cabin, or that he did not have some kind of guest connection with the cabin.

William J. Brennan, Jr.

I don't understand why you take the position that these are not relevant to the determination of whether he had a privacy interest.

If you could use them to tie him to the cocaine, why can't he use them to establish--

Mr. Andrew L. Frey

Well I believe he could use this evidence if there were a remand hearing.

I'm not saying... what I am saying, however, is that he has the burden on this issue, of coming forward... which he did not do--

William J. Brennan, Jr.

--Well, are you also saying that we might regard them as sufficient to establish that he had a privacy interest?

Mr. Andrew L. Frey

--I believe, I would disagree with such a holding by the Court.

William J. Brennan, Jr.

But we might... but we could.

Mr. Andrew L. Frey

They are evidence that would be relevant.

William J. Brennan, Jr.

We could.

Mr. Andrew L. Frey

Well, you could.

Thurgood Marshall

But Mr. Frey, you aren't abandoning the point that it wasn't litigated, are you?

Mr. Andrew L. Frey

No, it wasn't... it was not litigated--

Thurgood Marshall

You're not abandoning that, are you?

Mr. Andrew L. Frey

--Well, we are charged with--

Thurgood Marshall

You raised it when you started your argument.

Mr. Andrew L. Frey

--having failed to raise the point by the Petitioner.

Thurgood Marshall

Oh, I see.

Oh.

Mr. Andrew L. Frey

And our response, first, is that it was Petitioner's burden to come forward on this issue in the District Court and he overlooks the fact that this was... it's rather peculiar to charge us with waiving, when he has failed to meet his burden of coming forward, or his burden of--

Byron R. White

Mr. Frey, you're spending a lot of time on a point on which... we granted cert on another point.

John Paul Stevens

You didn't raise it in your brief in opposition to the cert petition, either, so--

Mr. Andrew L. Frey

--We didn't, until... we did not understand the pertinent facts until we reviewed the record in connection with preparing the brief on the merits.

But I will be happy, if the Court has no further questions on this point, to move on to the second issue.

And although the second issue is not one on which the Court granted certiorari, I believe it is one that the Court must consider and if it

determines the issue in our favor it will not and should not reach the substantive Fourth Amendment issue.

Now Petitioner's argument essentially, is that we are making some kind of general good faith argument here, and that there is some doubt, at least in Petitioner's mind, that the arresting officers were acting in subjective good faith.

I think he misapprehends our argument in this case.

He does not dispute and he can't, because certiorari was denied on the second question presented in the petition, that the agents' action was supported, they had the necessary quantum of suspicion to believe that Ricky Lyons was in the cabin, and under the decision of the Fifth Circuit in the Cravero case... and I might note, incidentally, that we acquiesced when certiorari was sought in that case, because we believed it presented a significant issue, and the Court denied certiorari, subsequent to that time the law in the Fifth Circuit on this point was about as settled as the law could be unless this Court were to do something to unsettle it.

William H. Rehnquist

--Actually, we cited Cravero in *Dalia v. United States*, did we not?

Mr. Andrew L. Frey

I'll take your word for it, I'm not aware--

William H. Rehnquist

Page 258,--

Mr. Andrew L. Frey

--Now Petitioner does not dispute that Payton itself, which our argument heavily relies on the fact that Payton was decided... he does not dispute that Payton is a case that should not be applied retroactively to arrest entries into the defendant's or suspect's own premises, and I don't think I need to belabor the point, Payton clearly altered the settled law of the Fifth Circuit on the Payton issue and the opinion itself in Payton stated that the practice that it was overturning was a longstanding and widespread practice.

John Paul Stevens

--Mr. Frey, in this argument are you essentially arguing that in the Payton case we should have not applied the Payton rule to Payton?

Mr. Andrew L. Frey

I will come to that point, because we have tried to be careful not to argue that and I will explain that point.

The complication in this case arises from the fact that the substantive Fourth Amendment issue presented here, while closely related to the issues presented in Payton, nevertheless is not clearly controlled by it.

That is, it is still possible that the government could win this case even though the state lost Payton.

Now, this fact, standing alone, does not justify reaching the issue in the case of a search that took place prior to the decision in Payton.

To do that would be to do the very thing that this Court criticized the Court of Appeals for doing in the Bowen case.

And the very thing that this Court declined to do in Stovall and DeStefano and in Payne... that is, to consider in the context, having

determined that a decision is not retroactive, to go on and consider a ramification of that decision.

That is not appropriate and the Court in Bowen, suggested that several reasons why the practice would not be done, including the Court's reluctance to decide constitutional issues unnecessarily.

Now, let me acknowledge that this case is different from those other cases in one respect: in Bowen, if the government had won Almeida-Sanchez, Bowen would have had no claim whatsoever, his claim was a lesser included claim than had been Almeida-Sanchez's claim... the same is true of almost all of those other cases, although with one exception that I'll get to in a moment.

Here it is possible that the state could have won Payton, I believe, and that the courts could nevertheless have concluded that Petitioner's position on the issue of third party entries is sound.

Now Petitioner's argument in his reply brief is that... and it's the point that you were making about Payton... that if the government is simply making a good faith argument, then the Court will never decide the issue that the police officers, and the Drug Enforcement Administration agents and so on and the Fifth Circuit, will continually be able to point to the Cravero decision and the Court will continually, as he construes our argument, be forced to say, although it's a matter of exclusionary rule policy, we won't reach the substantive constitutional issue.

William H. Rehnquist

Mr. Frey, so far this sounds like something out of St. Thomas Aquinas; perhaps it's our fault rather than yours that it does, but we

granted certiorari on a particular question, and I would have expected to hear argument on that question, first.

Mr. Andrew L. Frey

Well, I believe, though that as a matter of logical precedence, Mr. Justice Rehnquist, I will argue the other point now, if the Court prefers, but as a matter of logical precedence, the question is whether... it is a preliminary question whether you should reach the question on which you granted--

William H. Rehnquist

I'm one of the nine members of the Court, so I certainly can't say the Court prefers it.

Mr. Andrew L. Frey

--Well, let me just make this point and then I will move on to the substantive Fourth Amendment issue.

It is clear from Bowen, that if Payton is not retroactive, you should not undertake to decide the issue on which the Court granted this case.

In Payton, the state made a good faith argument and the Court implicitly, I suppose, rejected it, at least it did not advert to it in its opinion.

Byron R. White

Well the one that it... the question you're arguing now is a constitutional question, isn't it?

Mr. Andrew L. Frey

The question I am arguing now is a jurisprudential question.

I'm not sure that it's constitutional.

Byron R. White

What, about the exclusionary rule should not apply in this case?

Mr. Andrew L. Frey

Well this is... yes, our argument is an argument that, as the Court has explained the workings of the exclusionary rule--

Byron R. White

What if we found that one tougher than the other one?

I don't know why we couldn't reach the other one.

Mr. Andrew L. Frey

--Well, what you said in Bowen was that, and what you said in DeStefano and what you said in Payne and what you said in Stovall is that you would not do it.

Byron R. White

Well your time is certainly running fast.

Mr. Andrew L. Frey

Well, I just wanted to be sure that Mr. Justice Stevens understood my response to his point.

It is the very decision in Payton that changes the law.

That is, in Payton the Court was able to say we must reach the Fourth Amendment issue, otherwise the police will constantly be simply relying on the New York statutes and we'll never decide the issue.

Here, because of the intervening decision in Payton, Cravero is not a precedent that can any longer be relied upon in post-Payton cases.

And therefore, is a break in the fabric of Fourth Amendment arrest entry law, and therefore, pre-Payton searches... claims like this should not be considered.

Now, I will move on at this point to the substantive Fourth Amendment issue, even though we do believe it would not be proper for the Court to reach it.

We agree that it is a close issue, that there is much logic to the Petitioner's position.

Nevertheless, we think there are significant considerations that weigh in the other direction.

The first consideration is history.

Now, I... in its reply brief, Petitioner did not dispute our historical argument, and I'm sure the law clerks can do much better than I can in the time available, in digging into these... the esoteric of it.

If you will look at the passage or Coke that we cite, you will see that the discussion is talking about any man's house, or the house of any person, and it is not, I think, contemplating simply the house of the subject of the warrant.

And Coke does say,... it's an authority that was greatly relied on by the Court in Payton... that, at least after indictment, and this case was a warrant issued after indictment, the arrest warrant does constitute authority to break into any man's home.

Thurgood Marshall

May I ask a question?

Assuming I owned a home in Atlanta, you could use that warrant to break into my house tonight?

Mr. Andrew L. Frey

Excuse me?

Thurgood Marshall

Assuming I owned a home in Atlanta, Georgia, --

Mr. Andrew L. Frey

Yes.

Thurgood Marshall

--could you use this very same warrant and break into my house?

Mr. Andrew L. Frey

If we had reason to believe that the subject of the warrant was present in the house.

Thurgood Marshall

If the police said that, right?

Mr. Andrew L. Frey

If the police had that reason to believe.

Thurgood Marshall

He had to have that--

Mr. Andrew L. Frey

He had to have it, yes.

Thurgood Marshall

--You could break into my house?

Mr. Andrew L. Frey

Yes.

Thurgood Marshall

You could get hurt that way.

Mr. Andrew L. Frey

Let me just, I'd like to pass on from the history point.

John Paul Stevens

Well let me ask you one question on the history, because it really carries right down to date.

The quotation from Semayne that you have on page 38 of your brief, says the house of anyone is not a castle or privilege, but for himself, and shall not extend to protect any person who flies to his house or the goods of any other which are brought and conveyed into his house.

Now does your... would your position apply also to going into getting a gun, say, that the suspect--

Mr. Andrew L. Frey

No.

Well,--

John Paul Stevens

--Let's say you had a search warrant for the gun in the owner's house, and also an arrest warrant for the owner, and he takes his gun to the house but he's not there; can you break in to get the gun?

Mr. Andrew L. Frey

--No, of course not.

We're not relying on Semayne's case for every possible implication that could conceivably be dredged out.

John Paul Stevens

Why not?

And if you had the arrest... if you had the search warrant and you have probable cause to believe the gun is there, why doesn't the reasoning... why wouldn't your reasoning apply there?

Mr. Andrew L. Frey

You mean, why wouldn't... if Semayne's case were the history--

John Paul Stevens

Oh forget Semayne's case.

Just should there would be a distinction between the... a search for a person and search for property in terms of breaking into a third party's house?

Mr. Andrew L. Frey

--That would be the substance of my argument as to whether they should or they shouldn't.

John Paul Stevens

All right.

Mr. Andrew L. Frey

And as to the role of history, of course, there's much room for debate about what role history ought to play in a decision of this sort, it seems to me there is a limit beyond which the Fourth Amendment ought not to be construed to bar practices that were clearly permissible in common law, but this is a case which I concede is not as clear as *Watson* was, let's say, on the history.

Now laying this point aside and considering the matter from the standpoint of logic and policy, the argument is not all one-sided.

Now, we grant that there will be some cases in which a search warrant requirement would be useful in interposing a magistrate and preventing overzealous police officers from unreasonably invading third party premises.

But the issue must be placed in context.

Because we are talking about third party premises and not the residence of the individual named in the warrant, we are dealing with a class of cases in which, by definition, the connection of the suspect to the premises is likely to be brief or transitory.

Accordingly, a much higher proportion of this class of cases will involve exigent circumstances or at least circumstances in which recourse to the warrant procedure with the delays it often entails, will render the information regarding the presence of the subject on the premises stale.

What I'm saying is that the benefits that we may reasonably expect to reap from the imposition of a search warrant requirement, are

considerably diminished as against those which could have been anticipated from the decision in Payton.

With the weight on one side of the scale thus diminished, it seems to us questionable conclusion that an arrest entry by officers armed with an arrest warrant and possessing sufficient reason to believe the subject of the warrant is on the premises, is unreasonable under the Fourth Amendment unless they also possess a search warrant.

Now let me summarize the factors that favor continued adherence to the common law rule that an arrest warrant suffices to enter any premises in which the suspect is reasonably believed to be located.

First, the arrest warrant means that the magistrate has determined one of the elements required to be determined by the warrant clause; that is, he has determined that there is probable cause to seize the person named in the arrest warrant.

We concede of course that he has not determined that the person named in the arrest warrant is on the premises to which entry is to be made.

And I think that the case is weaker than Payton, that is, Payton's conclusion that an arrest warrant sufficed to enter into the premises of the individual named in the arrest warrant, rests on stronger grounds because of the greater likelihood that the individual will in fact be on his premises, and because of the fact that there are no general warrant problems associated with treating the arrest warrant as a power to enter into premises--

Thurgood Marshall

Well under a general warrant, it does give them the right to go into any premises that he... which means any officer in Atlanta, assumes

or has reasonable belief that that man is in there... he makes the decision as to the house that will be searched, not the magistrate.

I think--

Mr. Andrew L. Frey

--Well,--

Thurgood Marshall

--I think that's the problem.

Mr. Andrew L. Frey

--he makes the original decision, but of course, he must have this reason to believe, the decision is subject to a post-entry judicial scrutiny in connection either with a suppression hearing or a civil damages suit, this is not simply the uncontrolled discretion of the officer.

Now, I understand, and I could hardly argue otherwise, that all of the Court's warrant clause cases acknowledge that there is a value in having the magistrate look at the matter.

What we are saying is that the class--

Thurgood Marshall

But the real injury comes in going into the house.

Mr. Andrew L. Frey

--Well, most of the cases that are going to happen where this... where the subject of an arrest warrant is on third party premises, his stay is going to be brief, there will usually be exigent circumstances, the warrant requirement will usually, I think, not apply.

Now, of course there are cases, and perhaps this is one--

Thurgood Marshall

But I don't read that any place in the Fourth Amendment, that, you know, these things don't usually happen.

Mr. Andrew L. Frey

--Well but what the Court is doing, I think--

Thurgood Marshall

You still haven't... you admit that the official, the police official individually makes a decision as to which house he's going to search?

Mr. Andrew L. Frey

--Individually or collectively.

Thurgood Marshall

Without any... without any supervision at all?

Mr. Andrew L. Frey

Our position would be that the Constitution does not require him to submit the question whether the individual is in the house to the magistrate in advance of entering the house.

That is our position.

Now as I said, we're not saying that there is no value to having a magistrate interpose; what we are saying is that you have the factor of history which weighs more strongly on our side in this case than it did in Payton, and you have the fact that in this class of cases, after all what we're doing as a matter of constitutional policy-making in

the Fourth Amendment area, is weighing the costs to legitimate societal interests and law enforcement against the protection of equally significant individual privacy interests.

And then in engaging in that balancing endeavor, the Court has normally preferred a warrant and normally, I think there have been substantial reasons.

But our suggestion is that in this area, the reasons are reduced; the benefits that will be derived from a warrant requirement are diminished.

Potter Stewart

Is it any part of your argument, Mr. Frey, that it would be more difficult and in some cases, impossible, to comply with the Fourth Amendment's requirement that the premises to be searched have to be particularly described?

Mr. Andrew L. Frey

No.

Because I think there are only two situations--

Potter Stewart

Because if it's just a transitory presence in a third party's house, there's no reason that the officers would know... be able to particularly describe the premises to be searched.

Mr. Andrew L. Frey

--Well, but if in the normal situation, if the officers learn that Ricky Lyons has just gone into an apartment at such and such a place, and they go out there with sirens--

That would be exigent circumstances.

Mr. Andrew L. Frey

--blasting, and that would probably be exigent circumstances.

If there are not, I mean the gravamen of the argument here is that while they had a couple of days to track things down, and presumably they therefore would be able to--

Potter Stewart

Particularly describe the premises to be searched.

Mr. Andrew L. Frey

--in non-exigent cases, to describe the premises, yes.

I don't think that that would be a problem.

But I do think that the points that Mr. Justice White made in his dissent, in Payton, carried perhaps more force although they were not persuasive to a majority of the Court in Payton... they are carrying more force here, because of this difference in the balance.

The intrusion that's entailed in an arrest entry, while significant, is still very much less substantial than the intrusion that is entailed in an entry to seize books or records, to search for narcotics or other kinds of things that would involve rummaging through papers, desk drawers, and other customary repositories of privacy.

William H. Rehnquist

You mean you don't generally look for a person in a desk drawer?

Mr. Andrew L. Frey

I would say not.

And finally, I think that Justice White expressed in his dissent in Payton, a concern about the difficulty of having the police make this very, often very subtle judgment about what constitutes exigent circumstances, and he suggested that the common law rule that he and those who joined with him, thought should be retained, was an easier rule for the police to administer.

Now, that may not have been sufficiently persuasive in the context of Payton, because after all, in Payton there had not even been any determination that the individual who the officers... any magisterial determination that the individual who the officers were seeking was in fact subject to arrest.

There hadn't been... essentially no recourse to the magistrate in Payton, those consideration were found unpersuasive.

But in this case, there has been both partial recourse to the magistrate and the police--

John Paul Stevens

But Mr. Frey, this case is complicated because... everybody's sort of... relies with one another, but say you had a total stranger third party, who didn't have, any connection whatsoever remote or otherwise with the criminal conduct itself, and I take it your position is that... that that makes no difference in terms of the degree of the intrusion.

You could break down the doors and bust in, just to be sure you catch the man who is there.

There's no... the intrusion could be very, under your view, I'm not saying it always would be, but there's no question of knocking on the

door and asking leave to go in, you say you have a right to bust in?

Mr. Andrew L. Frey

--Well, I agree that the right is implied as a right to go in--

John Paul Stevens

Now it could be a serious intrusion, I'm not saying that it always would be, but on the--

Mr. Andrew L. Frey

--I am not suggesting--

Potter Stewart

--home of a totally innocent person?

Mr. Andrew L. Frey

--I understand that.

Yes, I understand that.

It could be--

--It gives you no concern?

Mr. Andrew L. Frey

Yes, it gives me concern.

I mean, I think we have indicated and acknowledged in our brief that this is an area of concern, this is an area where there is some potential for police abuse, this is an area where there is some utility... although I'm not sure how much... in having them go to the

magistrate, but I think that a few instances of improper police conduct could be avoided by a warrant requirement.

On the other hand, it puts the police in an extremely difficult position, and we are suggesting that the protections, the common law protections and the protections of post-entry--

William J. Brennan, Jr.

But Mr. Frey, in the absence of exigent circumstances which is the case here, there was ample opportunity to get a search warrant, wasn't there?

Mr. Andrew L. Frey

--No, in this case, by the time they--

William J. Brennan, Jr.

When they left, before they left the courthouse they could have gotten it, could they not?

Mr. Andrew L. Frey

--Well, I--

William J. Brennan, Jr.

There were three magistrates, as I understand it, on duty at the time?

Mr. Andrew L. Frey

--I'm not sure whether they left from the Atlanta courthouse--

William J. Brennan, Jr.

Well I'm accepting your colleague's suggestion that the assembly of the 12 officers who--

Mr. Andrew L. Frey

--In this case of course, they did not get a warrant because they thought that the arrest warrant was sufficient and the testimony in the portion of the transcript that we've appended to our brief shows that the agent says, you know, a search warrant... why I had an arrest warrant--

Warren E. Burger

--Well what about getting the search warrant after they had the house pretty well under surveillance and control?

Harry A. Blackmun

Well in that connection, how far is Buford, George, from Atlanta; it's a number of miles, isn't it?

Mr. Andrew L. Frey

--I think, I gather that it's some distance.

I'm not sure of the answer to that.

I think the prospect of house arrest, of all the occupants of the house, as a satisfactory alternative to entry is not a very appealing one.

It seems to me that it exposes a lot people to more danger and arguably involves a greater imposition on the people surround the place with 12 officers while somebody gets a warrant.

Now, I don't want to exaggerate the difficulty of getting a warrant.

As we indicated in our brief, at least for the federal government with telephonic warrant procedures, it is something that is not altogether infeasible.

But still, I do want to stress that the officers are left with some very difficult legal judgments to make, are there exigent circumstances in this particular case, or will my arrest warrant do?

Whose residence is this?

Is this the residence of the person subject of the arrest warrant, or is this the residence of some third party?

John Paul Stevens

On the other hand, Mr. Frey, the cost really, it doesn't really affect the prosecution of the person they are seeking.

And the only thing that you lose is the right to use evidence you just stumble across and happened to be in the possession of this homeowner that you didn't suspect a crime anyway.

Mr. Andrew L. Frey

No, I think the cost... I'm not thinking of the cost in terms of the application of the exclusionary rule so much as the--

John Paul Stevens

Assuming a mistake is made, you know.

Mr. Andrew L. Frey

--cost in terms of the police having clear guidelines as to how they ought to comport themselves to comply with the Constitution, and also the cost of adding to the warrant procedure a whole group of additional warrant applications of much lesser utility which may, in some way, dilute or diminish the seriousness of the warrant application procedure itself.

Thank you.

Warren E. Burger

Thank you, gentlemen.

The case is submitted.
